

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

HORACE E. BURNETT, Jr.,	)	CASE NO. 5:04CV00084
	)	
Plaintiff	)	
	)	
v.	)	<u>REPORT AND RECOMMENDATION</u>
	)	
	)	
JO ANNE B. BARNHART	)	By: B. Waugh Crigler
Commissioner of Social Security,	)	U. S. Magistrate Judge
	)	
Defendant	)	

This challenge to a final decision of the Commissioner which denied plaintiff's July 16, 2002 application for a period of disability and disability income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. For the reasons that follow, the court will RECOMMEND that an order enter REMANDING the case to the Commissioner for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, a Law Judge found that plaintiff previously had applied for but was denied benefits and that he met the special earnings requirements of the Act during the closed period extending from September 1985 through December 31, 1988 but not thereafter. (R.16-17, 24.) He also found that plaintiff, who was 46 years old with a

seventh grade education at the time his insured status expired, suffered the residual effects of a spinal injury he suffered as a longshoreman in 1985 which constituted a severe impairment though not severe enough to meet or equal requirement of any listed impairment. (R. 17, 23, 24.) Nevertheless, the Law Judge determined that plaintiff was unable to perform the heavy exertional work associated with being a longshoreman, though plaintiff had no past relevant work in the 15 years preceding this last application. (R. 21-24.) The Law Judge also found that plaintiff was a younger individual at the time his insured status expired, that his allegations concerning the effects of his impairment were not credible, and that plaintiff possessed, at the relevant time, the residual functional capacity for a full range of medium work. (R. 23-25.) By application of the Medical-Vocational Guidelines (grids) without making any findings concerning whether plaintiff suffered nonexertional limitations on his ability to perform work-related activities, the Law Judge determined that plaintiff was not disabled under the Act. (R. 24-25.)<sup>1</sup>

Plaintiff appealed administratively. (R. 294.) Finding “no reason” to review the Law Judge’s decision, the Appeals Council denied review and adopted the Law Judge’s decision as the final agency decision. (R. 5-7.) This action ensued.

On July 11, 2005, counsel for the plaintiff forwarded a letter to the undersigned by facsimile with certain attachments.<sup>2</sup> Included with those attachments were copies of a letter to the Appeals Council dated April 5, 2004 which attached copies of medical data relating to the plaintiff dating back

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<sup>1</sup>A VE was present and testified at the hearing that plaintiff had no past relevant work within the preceding 15 year period and that his prior work was arduous. (R. 333-334, 336.) He was not asked questions concerning the availability of jobs for a person with plaintiff’s maladies and their effects on or before the expiration of his insured status.

<sup>2</sup>The undersigned has directed the letter and attachments be filed for consideration by the court and treated as a motion for remand.

to 1982 and postal receipts showing receipt thereof by the Council. For reasons unknown to plaintiff's attorney and the undersigned those documents were not contained in the official transcript certified to the court and offered by the Commissioner as the administrative record in this case.

The importance of this, of course, is that a question now exists as to whether the Appeals Council fully and fairly considered all the evidence that was before it on administrative appeal in a manner consistent with *Riley v. Apfel*, 88 F. Supp. 2d 572 (W.D. Va. 2000) in which the court held that where the Council fails to make specific findings of fact regarding that evidence, and where the evidence does not otherwise compel a court to enter judgment in favor of the plaintiff as a matter of law on the record before it, the better practice is for a reviewing court to remand the case for further proceedings in order to give the Commissioner an opportunity to make findings of fact that can be meaningfully assessed under 42 U.S.C. § 405(g).

There is no question on this record that plaintiff was found to have proved a *prima facie* case of disability by establishing his inability to perform his past relevant work, and by the fact the Law Judge proceeded to apply the grids at the final level of the sequential evaluation. (R. 24-25.) There also is no question, and the Law Judge acknowledged, that in 1983, plaintiff's treating physician opined that plaintiff was unable to perform his work as a longshoreman and was permanently disabled, though the same physician apparently recommended that plaintiff engage in some weight lifting, which advice the plaintiff followed. (R. 17-18, 112-114.) There is a significant gap in the medical data from the early-to-middle 1980's until the late 1990's which plaintiff was able to reconstruct before the Law Judge only by way of lay testimony. The question then became whether that testimony, which was adduced only from plaintiff or members of his immediate family, was an accurate reflection of plaintiff's medically

determinable impairment and its effects on his ability to perform work-related activities. In the main, the lay testimony is supportive of the claim that plaintiff was not able to work during the relevant period, but it was not adjudged entirely credible, apparently because the Law Judge found the medical evidence during the relevant period to be wanting and the medical evidence produced in the early 2000's to show some improvement. (R.22, 296-333.)

In addition, the evidence submitted on judicial review very well may have a bearing on the Law Judge's use of the grids to compel a conclusion that plaintiff was not disabled. They certainly reveal the presence of an impairment which was likely to produce nonexertional limitations on plaintiff's work-related capacity. If that is the case, the Commissioner's own regulations bar the use of the grids to compel a result adverse to plaintiff. 20 C.F.R. § 404.1569, Appendix 2, § 200.00(e); see also *Walker v. Bowen*, 889 F. 2d 47 (4<sup>th</sup> Cir. 1989).

If *Riley* stands for anything it is that the Commissioner must first make findings on the extant evidence which then can be reviewed by the court. From all indications in the record before the court, the Council has yet to make any findings with respect to the evidence offered it by plaintiff in April 2004 though it was submitted almost three months prior to its decision denying review. Good cause exists to remand the case for further proceedings.

Accordingly, it is RECOMMENDED that an order enter REMANDING the case to the Commissioner for further proceedings consistent with *Riley*.

The Clerk is directed immediately to transmit the record in this case to the Hon. Samuel G. Wilson, Chief United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10)

days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: \_\_\_\_\_  
U.S. Magistrate Judge  
  
\_\_\_\_\_  
Date